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INSIGHT: ‘Team Telecom’ Advice to FCC to Bar China Telecom From U.S. Sets Trend

By Caroline E. Brown

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The “Team Telecom” recommendation that the FCC revoke China Telecom’s licenses doesn’t constitute a final determination, but it illustrates the reach of the Executive Branch agencies’ influence on the continued operations of a company with existing authorizations, Crowell & Moring’s Caroline E. Brown says.

On April 9, a group of Executive Branch agencies, including those that comprise the working group known as “Team Telecom,” recommended to the Federal Communications Commission that it revoke China Telecom (Americas) Corp.’s (China Telecom’s) authorizations to provide international telecommunications services to and from the United States.

China Telecom has been operating in the U.S. under 2007 authorizations conditioned upon the company’s adherence to a letter of assurance (LOA).

The recommendation is significant for the following reasons:

1. it offers further evidence suggesting that transactions involving Chinese ownership and the nation’s supply chain will face a high bar when undergoing clearance by regulatory review bodies such as Team Telecom;
2. it emphasizes that compliance with mitigation measures matters; and
3. it demonstrates what may become a more regular exercise of review authority pursuant to the recent Executive Order on the Committee for the Assessment of Foreign Participation in the U.S. Telecommunications Services Sector, formalizing Team Telecom.

Heightened Scrutiny

The recommendation comes amidst increasing concern of foreign influence over the U.S. telecommunications network, access, and supply chain. In 2018, Team Telecom recommended that the FCC deny China Mobile USA’s licensing application; the FCC did so unanimously in May 2019.

Subsequently, several elected and appointed officials called for the re-examination of the licenses of other Chinese telecommunication firms. The interest in re-examining the FCC licenses of Chinese-owned telecoms mirrors recent calls for the Committee on Foreign Investment in the U.S. (CFIUS) to heighten its scrutiny of transactions involving Chinese ownership.

While CFIUS and Team Telecom have operated in concert in the past, the April 4 executive order explicitly allows for information sharing with CFIUS, which could signal increased collaboration in assessing the national security implications of transactions under review by both committees.

The legal heft that the order affords Team Telecom also elevates its authority as a regulatory hurdle that companies must surpass in order to acquire the necessary licenses to operate.

Compliance With Mitigation Measures Matters

Non-compliance with its mitigation agreement was a key factor in Team Telecom's recommendation. Indeed, the agencies stated that further mitigation measures wouldn't adequately address national security and law enforcement concerns, citing China Telecom's "delayed responses to Team Telecom's request for information, its inaccurate statements to Team Telecom and U.S. customers, and its apparent failure to comply with federal and state cybersecurity and privacy laws."

The recommendation also highlighted that mitigation monitoring revealed breaches in at least two of the five provisions set forth in the 2007 LOA, namely to "take all practicable measures to prevent unauthorized access to U.S. records," and to "notify DOJ, FBI, and DHS of material changes to China Telecom's services."

The emphasis on China Telecom's non-compliance with its LOA as grounds for revocation of its license could signal renewed interest in examining compliance with mitigation agreements across the board.

Depending on the circumstances, Team Telecom may recommend that the FCC revoke a license rather than propose additional mitigation. Like China Telecom's 2007 LOA, many of these agreements state that a breach of any of the conditions provides independent grounds for terminating the authorizations.

Companies whose licensing authorizations were conditioned upon mitigation agreements could see increased engagement by the signatories to the agreement, and should be prepared both for lengthy dialogue with those agencies and to immediately respond to requests for additional materials.

The executive order sets forth procedures to recommend to the FCC that it condition its grant of authorizations on mitigation agreements and allows for mitigation monitoring with consequences for non-compliance, similar to Team Telecom's prior practices.

According to the order, a forthcoming memorandum of understanding will delineate what constitutes "standard mitigation." That description could aid companies subject to the committee's review to anticipate what mitigation measures may be required.

Broadened Mandate to Review Existing Licenses

Not only could companies with existing mitigation agreements see increased interest by the committee, but companies with existing authorizations that aren't subject to mitigation agreements may also find their authorizations being reevaluated.

The agencies' recommendation includes a discussion of the justification for continued review of companies already operating under FCC licenses, such as China Telecom. The agencies stated that "[b]ecause Section 214(a) directs the Commission to act when 'present' or 'future' interests are concerned, and to determine whether the public convenience and necessity require the carrier's service, the Commission should also apply the same deference to the Executive Branch's expertise with respect to any national security and law enforcement concerns associated with an existing international 214 authorization [as it does when initially considering an application]."

That may be the same rationale that informed the inclusion of Section 6 in the recent executive order, which allows for the review of existing licenses "to identify any additional or new risks to national security or law enforcement interests of the United States."

If the committee determines that there is "credible evidence" that the license poses a risk to U.S. national security or law enforcement interests, it may recommend that the FCC "modify the license to include a condition of compliance with mitigation measures," or "recommend that the FCC revoke the license due to the risk of national security of law enforcement interests of the United States."

Whether this is a nod to Team Telecom's prior practice of continuous review of authorizations subject to mitigation agreements, such as is the case with China Telecom, or whether it expands the scope to allow for the review of any existing authorization, may be clarified in the forthcoming MOU.

While the recommendation to revoke China Telecom's licenses doesn't constitute a final determination—the FCC makes that decision—it illustrates the reach of the Executive Branch agencies' influence on the continued operations of a company with existing authorizations.

And while questions remain regarding the implementation of the executive order, it's clear that it further bolsters the pivotal role that Team Telecom has played in transactions involving foreign ownership, in both the initial determination of whether to grant the license and in determining the license's duration.

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Author Information

Caroline E. Brown is a partner in Crowell & Moring LLP's International Trade and White Collar & Regulatory Enforcement practice groups where she provides strategic advice on national security matters and cross-border transactions, including anti-money laundering and economic sanctions compliance and enforcement challenges, CFIUS, and Team Telecom. She was previously an official in the Department of Justice's National Security Division and the Department of the Treasury.